85-1783

No.

Supreme Court, U.S.
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# In The Supreme Court of the United States

October Term, 1986

JOHN GREGORY ARDITO,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Whether petitioner was properly convicted for a conspiracy to obstruct justice in regard to an on-going criminal trial in the United States District Court, District of Connecticut at Hartford when concededly there was no proof whatsoever that petitioner knew that the trial was being held in a Federal Court, 18 USC 371, 1503?

2. Should a motion to suppress the products of Court ordered electronic surveilance, where conversations seized involving the petitioner, related to an offense, not contained in the warrant authorizing such electronic eavesdropping, (18 USC 25 17(5) and where the tape was not presented for sealing was not timely 18 USC 2518(2).

3. Where the indictment charging a conspiracy to violate 18 USC 1053 alleged 3 overt acts and the trial court over exception by counsel, charged the trial jury that the petitioner could be convicted if the jury found the commission of any overt act including an uncharged overt act, was the indictment thus expanded and did a fatal variance occur?

## TABLE OF CONTENTS

*Page*

Questions Presented .....i

Table of Contents .....iii

Jurisdiction .....1

Statement .....2

Reasons for Granting the Writ:

POINT I—Since The Government Concededly Failed To Establish That The Petitioner Knew That The Court Where The Trial Was Proceeding, Was A Federal Court, The Petitioner Did Not Violate 18 USC 1503 And Hence The Conspiracy To Violate That Statute Was Not Established .....4

POINT II—The Said Warrant Authorizing The Electronic Surveillance On The Conversations In The Petitioner's Apartment, Did Not Authorize The Overhearing of The Conversation Giving Rise To This Prosecution, And There Was No Timely Application For An Order Retroactively Authorizing Such Electronic Surveillance, Or Amending The Said Warrant .....9

POINT III—The Delay In Sealing The Tape Of December 3, 1983 And The Failure To Give A Satisfactory Explanation Of The Delay Rendered The Tape Inadmissible As Evidence .....13

POINT IV—The Court's Charge To The Trial Jury That If The Jury Found An Overt Act Proved, That Was Not Alleged In The Indictment, The Petitioner Could Be Convicted, Constituted An Unlawful Expansion Of The Indictment In Violation Of The Fifth Amendment: (Duty To Bring On Trial Of A Felony By A Grand Jury Indictment And/Or Due Process Of Law) .....16

Appendix A—Opinion of the Court Below with Final Order of Affirmance .....1a

Appendix B—Order of Justice Thurgood Marshall Associate Justice of the United States Supreme Court, and Circuit Justice of the United States Court of Appeals, for the Second Circuit .....14a

Appendix C—Indictment charging Petitioner with a Violation of 18 USC 371 and 1503, First Count .....15a

Appendix D—Constitutional And Statutory Provisions Involved ..... 19a

**CASES CITED**

*Delaware v. Van Ardale,* 54 U.S.L.W. 437 (1986) .....12

*Liporata v. U.S.,* 85 LED 2d 434, 441 (1985) .....7,8

*Nye v. U.S.,* 313 U.S. 33, (1940) .....6

*Pettibone v. U.S.,* 148 U.S. 197, (1893) .....7

*U.S. v. Feola,* 420 U.S. 671, (1975) .....5

*U.S. v. Gigante,* 538 F.2d 502 (Cir. 2d 1976) .....13

*U.S. v. Giordano,* 416 U.S. 505, (1974) .....10

*U.S. v. Knife,* 371 F.S. 1345, 1347 (DCSD, 1971) .....7

*U.S. v. Kulstian,* 525 F.2d 585, 589, (Cir. 9th 1973) .....10

*U.S. v. Lane,* 88 L.Ed. 2d 814 (1986) .....12

*U.S. v. Massino, et al.,* Cir. 2d Slip Opinion, Feb. 21, 1986, page 7163 .....15

*U.S. v. Miller,* 85 L.Ed. 2d 99, 105 S.Ct. 815, 471 U.S. _(1985) .....17

*U.S. v. Prince,* 529 F.2d 1108, (Cir. 6th, 1976) .....7

*U.S. v. Rico,* 421 F.S. 401, (1976) affd. 566 F.2d 433 (Cir. 2d 1976) .....14

*U.S. v. Rodriquez,* Cir. 2d, Slip Opinion, Feb. 24, 1986 at page 1881 .....15

*U.S. v. Turkette,* 452 U.S. 576, (1981) .....7

*U.S. v. U.S. District Court,* 407 U.S. 297, (1972) .....11

*U.S. v. Vasquez,* 605 F.2d 1269, (Cir. 2d 1979) .....14

*U.S. v. Yermian,* 468 U.S.__, 104 Sup.Ct. 2936, 82 L.Ed. 2d 53, (1984) .....8

*U.S. v. Zalli,* 51 FRD 522, 528 (ED-NY) .....7

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Order of the United States Court of Appeals for the Second Circuit is dated January 31, 1986; and said Order also contains the opinion of that Court and the affirmance of a judgment of the United States District Court.

The Order of the U.S. Court of Appeals for the Second Circuit, dated January 31, 1986 which also contains the opinion of that Court is set forth in Appendix A, infra and is otherwise reported in 782 F.2d 358.

## JURISDICTION

The judgment, order of affirmance and the opinion of the United States Court of Appeals Second Circuit was made and entered January 31, 1986, on March 10, 1986, Associate Justice Thurgood Marshall extended the time within which to file this Petition for Certiorari, to May 1, 1986.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

## STATEMENT

The petitioner, VINCENT POLLINA, GUS and FRANCES CURCIO were indicted by the Connecticut Federal Grand Jury as follows. Conspiracy under the general conspiracy statute 18 USC 371 to violate 18 USC 1503. A second count of that indictment named only GUS and FRANCES CURCIO for violating 18 USC 1503. The petitioner and VINCENT POLLINA, were not indicted under this count. Prior to trial GUS and FRANCES CURCIO pled guilty to the two charges in the indictment. The case was thereafter tried before a jury on the first count of the indictment charging a conspiracy as aforesaid.

From the facts developed at trial, petitioner and co-defendant VINCENT POLLINA, were having a consultation in petitioner's Bronx apartment. What they didn't know was that in that apartment was an electronic device that was placed there pursuant to a Court Order, granted by Judge Robert Sweet a District Judge for the Southern District of New York, said Order being dated December 1, 1983. By the terms of said Order, it expired December 31, 1984.

The function of this device was to surreptiously record conversations between petitioner and others relating to the crimes designated in the said Order. What was not designated as an enumerated crime in said Order was 18 USC 1053.

On December 7, 1983 in the evening POLLINA and ARDITO were having this discussion. At the same time in Hartford, Connecticut in a U.S. District Court, Frances

and Gus Curcio and others were on trial for various Federal crimes. Judge Clairie presided at that trial which commenced of course prior to December 7, 1983.

The petitioner and the co-defendant were not involved in that trial. Concededly, petitioner was never claimed by the Government to even know that such trial was in the Federal Court, District of Connecticut, Hartford.

The two Curcio's prior thereto conspired to disrupt the trial that they were involved in and to cause a mistrial. One of the Curcios feigned an illness having the semblance to a heart seizure. The other brother, claiming that the Federal prosecutor, derided this, rushed to him in a threatening manner. This occurred October 27, 1983 and comprised the first two overt acts of the conspiracy charge in the first count of the indictment.

After the agents recorded this conversation it was taken to the home of one of those agents. On December 8, 1983 it was deposited in a Government office in a secured place. On January 5, 1984 it was presented to Judge Sweet for sealing.

Meanwhile, on December 8, 1983 the authorities communicated with Judge Claire and the scheme was thwarted. Judge Claire ordered the tape recording he heard sealed.

The substance of this recorded conversation was that the petitioner gave POLLINA "pills." That POLINA was asked by the petitioner to give "him" 3. Petitioner allegedly said that if the "pills were taken" before going to Court the night before, the taker of those pills would "throw up." The conversation referred to overt act number three.

The conspiracy was charged as ending December 8, 1983.

## REASONS FOR GRANTING THE PETITION

### POINT I

**SINCE THE GOVERNMENT CONCEDEDLY FAILED TO ESTABLISH THAT THE PETITIONER KNEW THAT THE COURT WHERE THE TRIAL WAS PROCEEDING, WAS A FEDERAL COURT, THE PETITIONER DID NOT VIOLATE 18 USC 1503 AND HENCE THE CONSPIRACY TO VIOLATE THAT STATUTE WAS NOT ESTABLISHED.**

As was held in the Second Circuit, this issue was raised at the trial level, 782 F.2d at 360. Sections 18 USC 1503 after a description of the acts that would infract that statute refers initially to a Court of the United States. It then goes on to specify the persons and activities protected and prohibited. The concluding phrase is more general. The issue is whether an offense is made out where the offender has no knowledge of the Federal nature of the Court.

Recent enactments of Federal obstruction statutes are found in successive sections following Section 1503. Thus it is clearly stated in 18 USC 1512(e) that:

> "In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—
>
> (1) That the official proceeding before a Judge, Court, Magistrate, Grand Jury or Government agency is before a Judge or Court of the United States, . . .";

The crucial holding considered by the Court below was *U.S. v. Feola,* 420 U.S. 671, (1975). There Federal agents were assaulted by the petitioner. The agents were acting incognito, and the offenders were posing as narcotic traffickers, pretending to sell the agent narcotics; their real intent was to merely commit a robbery, the money for the sale to be taken. The agents played along and at the crucial time a robbery was committed the petitioners believing the agents had the money to buy narcotics. The goal of this conspiracy was 18 USC 111. The theory of the defense was that there was no intent to assault Federal agents under the latter statute hence there could be no conspiracy. Section 111 as interpreted by this Court was held to be definite enough and didn't require any particularized intention relating to the true identity of the victims, disguised Federal agents.

This Court in *Feola,* criticized U.S. v. Crimmins, 123 F.2d 271, (Cir. 2d) holding that to establish a conspiracy under 18 USC 371 in distinction to establish a substantive crime, a goal of the conspiracy, a higher standard of proof of intent and knowledge was required, at page 696 of 420 U.S.

However, *Feola* also held that the goal of the conspiracy in Section 111 was enacted to provide a Federal forum to try violent offenses against Federal agents. That while the states also had penal laws that could cover an assault of a Federal agent, Section 111 provided an additional remedy for the Federal Government, and that the Federal Government was implicated because it could deal more effectively with such a situation. That to require knowledge of the nature of the Federal agents' Federal office would frustrate the Federal agents operating incognito to effectively perform their duties.

It is put that this Court's holding in *Feola* does not apply to the facts of this case. Rather the issue is what does a particular substantive statute require in regard to intent and knowledge; see *Feola,* 696 of 420 US.

The Court below acknowledged that the history of Section 1503 was rather vague as both parties to this case agreed.

In *Nye v. U.S.,* 313 U.S. 33, (1940) the origin of Section 1503 was dealt with. In that case the petitioner was held for a contempt of a Federal Court, in which there was pending a civil action. The predicate statute for the contempt was 28 USC 385. The contempt consisted of petitioner attempting to have a plaintiff who was a civil litigant discontinue a Federal action. To accomplish this, recourse had to be taken to a State Court, because the civil litigant, one Elmore, was appointed administrator of his son's estate by a state court, and as such commenced the civil action in a Federal Court. It was held that because the occurrences took place outside the presence of the Federal Court or even within proximity to it, there could be no contempt. This Court acknowledged that one of the purposes of enacting the predecessor to Section 1503 was to cover this gap, at pages 46, 47. The predecessor to Section 1503 was enacted in 1831, pages 46, 47. In other words, Section 1503 was enacted to curb the contempt jurisdiction of a Federal Court.

It is submitted that if a given accused has corruptly "obstructed" justice, a distance away from the Court or not in its immediate presence, the accused must be shown to know that it is the Federal Court that is involved, not some other tribunal.

To hold otherwise, an offender under Section 1503 at any place in the United States could be brought into a Federal Court at a locale thousands of miles away without in any way knowing that some Federal Court is involved. Petitioner is not urging a venue issue, nor is petitioner oblivious to the point of Section 1503, but rather urges that the statute means that one knows that one is acting offensively to a matter pending in a Federal Court.

In *U.S. v. Prince,* 529 F.2d 1108, (Cir. 6th, 1976) decided in the wake of *Feola, supra,* the jurisdictional element of 18 USC 1952, e.g., was the interstate travel act, to promote an illegal activity, in a state. In *Prince,* the local activity was prostitution. Prince was not shown to have known of the interstate travel of a prostitute or even to be involved in interstate transportation. The prosecution failed. Since the petitioner in this case was not at all shown to have known where justice was being obstructed, the prosecution failed in its proof. See *Prince,* pages 1111, 1112, 529 F.2d supra.

See also *Pettibone v. U.S.,* 148 U.S. 197, (1893) at pp. 205, 206, 209.

It is respectfully submitted that the meaning of Section 1503 for the purposes of the conspiracy in this case, is in doubt; compare 18 USC 1512, supra. It is therefore respectfully urged the penal statutes are to be construed narrowly and that the Federal rule of lenity applies. The Federal rules of lenity applies here because of the obscure history of Section 1503. Where the national legislature provides otherwise, of course this rule does not apply; see *U.S. v. Turkette,* 452 U.S. 576, (1981), at p. 587.

See also, *U.S. v. Zalli,* 51 FRD 522, 528 (ED-NY 1970), *U.S. v. Knife,* 371 F.S. 1345, 1347 (DCSD, 1971) and *Liporata v. U.S.,* 85 LED 2d 434, 441 (1985), infra.

In *U.S. v. Yermian,* 468 U.S.__, 104 Sup.Ct. 2936, 82 L.Ed. 2d 53, (1984) the defendant in connection with his employment falsely executed and submitted a security questionnaire, that was required by the Federal Government, see also 18 USC 1001. The defense requested a jury instruction to the effect that the jury to convict the defendant had to find beyond a reasonable doubt that the defendant knew that the Federal Government was implicated otherwise the defendant was to be acquitted. This was denied at the trial level, but the Court did charge the jury that the defendant could be convicted if the jury found that the defendant knew or should have known that the writing was to be submitted to a Federal agency, pages 57, 58 Fn. No. 3, 4. Examining the legislative history of Sec. 1001 it was held that the conviction was proper. It is to be noted however that the jury in that case was instructed at least in regard to the defendant's knowledge of Federal involvement or that defendant should have known that a Federal agency was involved, at page 63 of 82 L.Ed. 2d Fn. 14.

Shortly after that decision this Court decided *Liparota v. U.S.,* 471 U.S.__, 105 Sup. Ct. 2084, 85 L.Ed. 2d 434, (1985). The defendant in that case was convicted of violating 7 USC 2024(b) which generally provided that the knowing use, transfer, acquisition, alteration or possession of coupons not authorized by a statute or regulation, constituted a crime. The issue on that case was that the defendant didn't know that his acquisition or possession was not authorized by the statute or any regulations thereunder. This Court held that such knowledge and intent to violate the statute was a required element. The Government in that case contended that the holding in *Yermian, supra,* governed this case. On page 444 of 85 L.Ed. 2d it was stated in part that:

". . . All parties agreed that the statute required proof at least that the defendant knowingly and wilfully made a false statement. Thus unlike the instant case, all parties in *Yermian* agreed the Government had proved the defendant's mens rea. The controversy in *Yermian* centered on whether the Government also had to prove that the defendant knew that the false statement was made in a matter within the jurisdiction of a Federal agency. With respect to this element, although the Court held that the Government did not have to prove actual knowledge of Federal agency jurisdiction, the Court explicitly reserved the question whether some culpability was necessary with respect even to the jurisdictional element . . ." (omitting internal quotations, citations and emphasis).

## POINT II

**THE SAID WARRANT AUTHORIZING THE ELECTRONIC SURVEILLANCE ON THE CONVERSATIONS IN THE PETITIONER'S APARTMENT, DID NOT AUTHORIZE THE OVERHEARING OF THE CONVERSATION GIVING RISE TO THIS PROSECUTION, AND THERE WAS NO TIMELY APPLICATION FOR AN ORDER RETROACTIVELY AUTHORIZING SUCH ELECTRONIC SURVEILLANCE, OR AMENDING THE SAID WARRANT.**

One of the grounds urged by the petitioner in the Pre-Trial motion to suppress this evidence relating to overhearing on December 7, 1983 was that Section 1503 was never enumerated in the said warrant. This was based on the legislative directive contained in 18 USC 2517(5). This section regulates the use of the warrant after it is granted and it is submitted comports with basic Fourth Amendment requirements to the control of the authorities executing a warrant. Congress clearly contemplated the by

then familiar situation that the authorities having a warrant to search and seize for a particular crime they were investigating, may very well come across other evidence of a criminal nature that could be used for a different prosecution. Accordingly, Section 2517(5) in its concluding portion provides that:

> ". . . where such Judge finds on subsequent application that the contents otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable."

Initially it is brought to this Court's attention that the exclusionary rule whatever its Court fashioned origin, expressly provided the remedy of suppression in Section 2518 subd. 10(a)(i)(iii). It would appear that these sections meet the general warrant requirements of the Fourth Amendment and embody a preference for the authorities to procure a search warrant.

Furthermore, it has been held that Courts should subject the various statutory provisions regulating this type of intensive investigation strictly; see *U.S. v. Giordano,* 416 U.S. 505, (1974), *U.S. v. Kulstian,* 525 F.2d 585, 589, (Cir. 9th 1973). Sec. 2517(5) of 18 USC, in part providing that where the authorities overhear conversations relating to an unauthorized offense, pursuant to the warrant, judicial approval therefor must be sought in a subsequent application made "as soon as practicable."

Furthermore, since electronic surveillance is regulated by the statutes in question, it would seem that "good faith" is irrelevant to the issue of excluding the evidence seized.

The Government resisted the said application by arguing that impliedly and expressly that the subsequent authorization was had. Thus the Government argued that the authorities were directed in the warrant to submit a 7-day weekly report to Judge Sweet and that this report was made December 9, 1983. The report did refer to the December 7, 1983 conversation. The second implication urged by the Government was that on January 11, 1984 Judge Sweet granted an order extending the first warrant and therefore impliedly approved the seizure. Finally the Government, on August 15, 1984, did procure a Court Order from Judge Burns, a District Court Judge for Connecticut, allowing use of the December 7, 1983 conversation. Her Order authorized the presentation of the case to the Grand Jury and at trial in regard to Section 1503.

It is submitted that the "implied approval" is not within the statute. It is put that firstly the Fourth Amendment has been construed to profer warrants in regard to searches and seizures and it is submitted, that the search and seizure conducted by the authorities is presumed void unless the authorities can show that the search and seizure came within the general warrant requirements of the Fourth Amendment; see *U.S. v. U.S. District Court,* 407 U.S. 297, (1972) at pps. 317, 318.

The Order of Judge Burns was made August 15, 1984, seven months after the recording made on December 7, 1983. This was hardly an application made as soon as "practicable."

Before that, and in the Southern District, the subsequent application for an order extending the first warrant was granted January 11, 1984. More than one month after the seizure of December 7, 1983. This was hardly a product of an application made as soon as "practicable." Further, that order and supporting application for it was

never disclosed to counsel. The existence of the Order was divulged, but not the order or the application for it.

In regard to the report to the issuing Judge, dated December 9, 1983, two days after the seizure, this "report" was not an amendment to the initial warrant. The Trial Court never directed an evidentiary hearing to the petitioner or to counsel to be confronted with all the circumstances surrounding this report and whether the Judge made any expressed particular findings ratifying the seizures of December 7, 1983. Nothing is said in 2517(5) about "implied" authorizations by a Judge in this regard.

Furthermore, the petitioner has no duty to show "prejudice." Put another way, if a lack of showing of prejudice is a bar to relief, this is similar to an equivalent of the "harmless error" rule. The error here it is submitted, was of constitutional magnitude. It involved the Fourth Amendment to the Federal Constitution as well as the statutes themselves. Even if this "harmless error" exception applies to weighing the effect of a constitutional violation, it is submitted the entire record must be examined by the appellate tribunal; see, *U.S. v. Lane,* 88 L.Ed. 2d 814 (1986) at pps. 823, 825. Put another way, the test is not whether there is sufficient evidence extraneous to the error to sustain a conviction, but whether the error substantially affected the verdict or results in a serious doubt that it did not affect the verdict. This record over here discloses that without this conversation there would have been very little significant evidence holding the petitioner to the conspiracy. As was stated in *Delaware v. Van Ardale,* 54 U.S.L.W. 437 (1986) at pp. 43, 49:

> "As wae have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one . . . In Chapman, this Court rejected the

argument that all Federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction. The Court reasoned that in the context of a particular case, certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the fact finding process of trial. Since Chapman we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the revealing Court may say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt . . ."

It is submitted again, that this Fourth Amendment violation was substantial and resulted in substantial evidence that went into the conviction of this petitioner.

## POINT III

### THE DELAY IN SEALING THE TAPE OF DECEMBER 3, 1983 AND THE FAILURE TO GIVE A SATISFACTORY EXPLANATION OF THE DELAY RENDERED THE TAPE INADMISSIBLE AS EVIDENCE.

The pre-trial application for suppression of the tape was partly grounded on a violation of 18 USC 2518(8)(a). That statute in part provides for the immediate presentation to a Judge, for sealing; for the failure to give a satisfactory explanation for the delay see *U.S. v. Gigante,* 538 F.2d 502, (Cir. 2d 1976) at pp. 503, 504. The statutory requirement goes to the probity of the evidence and the prevention of post execution tampering. The warrant expired December 31, 1983. On January 5, 1984 presentation of that recording was made to Judge Sweet. There thus was a delay of 5 days. The Court below at pp. 362, 363 of 782 F.2d ruled that:

". . . Furthermore, the fact that the Government did not present recordings for sealing until January 5, 1984, 5 days after the first surveillance period expired, did not violate 18 USC 2518(8)(a) which requires that such recordings be made available to the Judge immediately upon the expiration of the Order. The intervening two-day holiday, the unavailability of the Judge who issued this surveillance order for a third day, the need for the agent to prepare the paperwork for the extension of the surveillance, and the absence of prejudice, all combined to excuse the relatively short period of delay in question . . ." (omitting internal quotations and citations)

In *U.S. v. Rico,* 421 F.S. 401, (1976) affd. 566 F.2d 433 (Cir. 2d 1976) it was stated in part at pg. 410 of 421 F.S. that:

". . . 'immediate' must be interpreted reasonably; of course, it does not mean instantaneous action . . . What it does mean is that the law enforcement resources which must be used with reasonable dispatch to the end that the tapes are sealed as soon as possible in the said circumstances. . ."

There was no showing by the Government that there was not another Judge available to supervise the sealing. The Courthouse was not inaccessible to the Government.

As stated in *U.S. v. Vasquez,* 605 F.2d 1269, (Cir. 2d 1979) sealing can be had in two or three days at page 1278. On page 1280 of 605 F.2d it was stated in part that:

"However, in law as in life, today's satisfactory explanation may very well be tomorrow's lame excuse. As to Federal and State case law, this area grows, and the failure to foresee and, where possible, prevent sealing delays, become less justifiable as law enforcement officials must be expected to learn from their own experience and those

> of others. As other Courts have done, we decline to follow the police to rely on their own failure to use proper equipment or to institute more efficient procedures as an excuse for delay . . . The wire tapping statute imposed a duty on the judiciary as well as on the prosecutor. It is our role to exclude from evidence, tapes not sealed in accordance with the law."

In less than a month after the affirmance in this case, the same Court was confronted with the issue of late sealing and decided two cases, *U.S. v. Massino, et al.,* Cir. 2d Slip Opinion, Feb. 21, 1986, page 7163 where that Court exercising its supervisory jurisdiction laid down the rules where a delay is more than two days from the termination of the order, as to sealing. The Court further held that administrative delays would not be acceptable. That ruling was confined to "future cases." Next, the Court of Appeals decided *U.S. v. Rodriquez,* Cir. 2d, Slip Opinion, Feb. 24, 1986 at page 1881. That case dealt with matters of substance. The factors of timely sealing and an explanation of why the tapes were not sealed "immediately" at pages 1890, 1891 were reviewed. Among other things it was held at page 1894 that:

> ". . . While the Government's reliance on the absence of Judge Burns to explain part of the delay is unacceptable, we conclude that the remainder of the Government's explanation is not insufficient as a matter of law to satisfy the statute."

## POINT IV

**THE COURT'S CHARGE TO THE TRIAL JURY THAT IF THE JURY FOUND AN OVERT ACT PROVED, THAT WAS NOT ALLEGED IN THE INDICTMENT, THE PETITIONER COULD BE CONVICTED, CONSTITUTED AN UNLAWFUL EXPANSION OF THE INDICTMENT IN VIOLATION OF THE FIFTH AMENDMENT: (DUTY TO BRING ON TRIAL OF A FELONY BY A GRAND JURY INDICTMENT AND/OR DUE PROCESS OF LAW).**

The Fifth Amendment mandates that a felony has to be charged by a Grand Jury indictment. At trial the Court defined an overt act to the Jury but added that the jury could convict if they found evidence of an uncharged overt act. See 18 USC 371.

Pursuant to Rule 7(f) FRCP, counsel made a timely motion for an order directing the Government to serve and file a bill of particulars alleging whether any proof would be offered at trial relating to any uncharged overt acts. That application was denied. It is submitted that this was a violation of due process of law.

There were three overt acts alleged in the indictment. The first two acts related to the incidents at the Federal trial where the Curcios were defendants, on October 27, 1983. The third alleged overt act related to the matters embraced in the conversation between petitioner and co-defendant POLLINA, December 7, 1983.

The denial of the motion for a bill of particulars under tghe particularized circumstances of this case was

also a denial of due process of law (procedural) because it denied petitioner notice of the charges.

The jury charge complained of, may have allowed an expansion of the indictment by the Trial Jury. Since the verdict was a general one, it is unknown what the Trial Jury did in this regard. It is not known what evidence there was before a Grand Jury as to this issue. There is no speculating what went on before the Grand Jury. The Grand Jury was satisfied that there were three overt acts as alleged; it may not have occurred to the Grand Jury there were other overt acts.

In *U.S. v. Miller,* 85 L.Ed. 2d 99, 105 S.Ct. 815, 471 U.S. __ (1985) it was held that the Fifth Amendment mandate for an indictment by a Grand Jury to bring on a trial for a felony, was not breached by narrowing the indictment where the proof was included within the indictment. That was not a fatal variance, in overruling Ex Parte Bain, 121 US 1 (1887). On page 111 of 85 L.Ed. 2d it was stated in part that:

> ". . . The variance complained of added nothing new to the Grand Jury's indictment and constituted no broadening . . . , what was removed from the case was in no way essential to the offense on which the jury convicted."

WHEREFORE, JOHN GREGORY ARDITO, the petitioner above named, prays that a Writ of Certiorari issue to review the final order of the United States Court

of Appeals for the Second Circuit in the above entitled case.

Dated: New York, New York
April 28, 1986

ARNOLD E. WALLACH
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*Member of the Bar of the*
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**APPENDIX A—OPINION OF THE COURT BELOW WITH FINAL ORDER OF AFFIRMANCE.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 393, 394—August Term, 1985

(Argued November 6, 1985 Decided January 31, 1986)

Docket Nos. 85-1271, 85-1272

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

JOHN GREGORY ARDITO and VINCENT POLLINA,

*Defendants-Appellants.*

Before:

FRIENDLY, TIMBERS and PRATT,

*Circuit Judges.*

Appeals from judgments of conviction entered July 11, 1985 in the District of Connecticut, T.F. Gilroy Daly, *Chief Judge*, after jury trial, convicting appellants of

conspiracy to obstruct justice, in violation of 18 U.S.C. §§371, 1503 (1982).

Affirmed.

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ARNOLD E. WALLACH, New York, N.Y. (Peter J. Peluso, New York, N.Y., on the brief), *for appellant Ardito.*

JOHN R. GULASH, Jr., Bridgeport, Conn., *for appellant Pollina.*

WILLIAM C. BRYSON, Attorney, Department of Justice, Washington, D.C. (Alan H. Nevas, United States Attorney, New Haven, Conn., and John H. Durham, Special Attorney, Department of Justice, New Haven, Conn., on the brief), *for appellee.*

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TIMBERS, *Circuit Judge:*

Appellants John Gregory Ardito and Vincent Pollina appeal from judgments of conviction entered July 11, 1985 in the District of Connecticut, T.F. Gilroy Daly, *Chief Judge.* Following a jury trial, appellants were convicted of conspiracy to obstruct justice, in violation of 18 U.S.C. §§371, 1503 (1982).

We find that the principal issue on appeal arises from appellants' assertion that the obstruction of justice stat-

ute, 18 U.S.C. § 1503, requires proof that appellants knew the proceeding they obstructed was a federal proceeding. We hold that § 1503 does not require the government to prove that the proceedings which appellants intended to obstruct were known by appellants to be federal in nature. Other subordinate issues are raised.

For the reasons set forth below, we affirm.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

Appellants were convicted of conspiracy to obstruct justice because of their out-of-court activities during the trial of Francis and Gus Curcio. After the conclusion of the trial of the Curcios in Hartford for loansharking before a jury and T. Emmet Clarie, *District Judge*, appellants were indicted on August 30, 1984 for conspiring to aid the Curcios in obtaining a mistrial. The Curcios also were indicted in the instant case for conspiring to obstruct justice. They pleaded guilty before trial. Our Court previously has dealt with various aspects of the Curcio loansharking case. *See United States* v. *Curcio*, 712 F.2d 1532 (2 Cir. 1983); *United States* v. *Curcio*, 694 F.2d 14 (2 Cir. 1982); *United States* v. *Curcio*, 680 F.2d 881 (2 Cir. 1982).

The Curcio loansharking trial before Judge Clarie was plagued by a number of interruptions. The government presented its case between October 4 and October 19, 1983. Late in the evening of October 20, the first day of defendants' case, defendant Gus Curcio checked into a hospital complaining of chest pains. The next morning,

he checked out of the hospital. The court granted a postponement to allow for a further medical examination. On the day that trial resumed, October 27, Gus Curcio, who was seated at the defense table and in the presence of the jury, appeared to suffer a heart attack, clutching his throat and chest. Believing that a prosecutor was smiling at the outburst, co-defendant Francis Curcio charged at the prosecutor. At this point, Judge Clarie adjourned the trial and appointed a cardiologist to examine Gus Curcio. The examination was inconclusive, and the Curcios moved for a mistrial on November 8. Judge Clarie denied the motion and, after an angiogram was arranged for Gus Curcio and indicated no heart malfunction, ordered the trial to resume on November 15. On November 15, defense counsel reported that Francis Curcio had been injured in an automobile accident. Judge Clarie denied another motion for a mistrial. Francis Curcio attended the remainder of the trial in a wheelchair. The Curcio loansharking trial was ultimately resumed on December 6, with the presentation of evidence completed on December 8 and a verdict of guilty returned by the jury on December 14, 1983.

During the Curcio loansharking trial, the government conducted electronic surveillance at various locations, including a social clubhouse in Bridgeport, Connecticut, and premises in the Bronx occupied by appellant Ardito. Two conversations relating to the Curcio trial were introduced as evidence at appellants' obstruction of justice trial.

In a November 4, 1983 conversation between appellant Pollina and the Curcios at the Bridgeport clubhouse, the discussion included the loansharking trial, the desire for postponements and a mistrial, and the loansharking busi-

ness. Appellants Ardito and Pollina also were overheard in a December 7, 1983 conversation which took place in the Bronx. Appellants discussed the Curcio trial. Ardito handed Pollina three pills and instructed Pollina to give them to the Curcios. Ardito also gave Pollina an inhalant that he described as benzadrine, a type of amphetamine, for one of the Curcios to take. The pills were designed to cause one of the Curcios, presumably Gus, to vomit in court. The December 7 conversation also included loansharking business information that Ardito wanted relayed to the Curcios.

A government attorney reported the December 7 conversation to Judge Clarie on December 8, the last day of the Curcio trial. Judge Clarie warned the parties that further disturbances in the courtroom would result in revocation of the Curcios' bail. No further disruptions occurred.

At appellants' obstruction of justice trial, the recorded conversations of November 4 and December 7 were played for the jury. A toxicologist testified on behalf of the government regarding the effect of amphetamines in inducing the symptons of a heart attack and the effect of the drug Mettryl in inducing vomiting. An FBI agent defined such terms as "captain", "capo", "regime", and "crew"—terms which the jury had heard on the tapes. Appellants presented no evidence at the trial.

The jury returned guilty verdicts as to each appellant. The court sentenced each appellant to five years imprisonment and a $10,000 fine. Appellants are serving their sentences.

## II.

The principal issue raised on appeal is whether 18 U.S.C. § 1503 requires proof that appellants knew that the proceeding they were charged with having obstructed was federal in nature. At trial, appellants requested such a jury instruction which Judge Daly denied. The tape recorded conversations which the government introduced at trial did not contain any statements which would suggest that appellants knew that the Curcios were being tried in a federal court. Appellants did not attend the Curcio trial in the federal court at Hartford.

Section 1503 does not provide for the scienter requirement which appellants urge upon us. They were charged under the following provision of the statute:

> "Whoever . . . corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1503. Both sides agree that the legislative history of § 1503 is not dispositive of the scienter controversy. Although appellants argue that Congress' express prohibition of knowledge of the federal nexus as an element of the offense under § 1512 shows that Congress knew how to prohibit such a scienter requirement when it wanted to, we find that argument unpersuasive in light of the fact that the present § 1503 has remained substantially unchanged since the enactment of its first predecessor in 1831, *see* Act of March 2, 1831, ch. 99, § 2, 4 Stat. 487, 488, and § 1512 was enacted only recently, in 1982.

Appellants rely primarily on *Pettibone* v. *United States*, 148 U.S. 197 (1893), in support of their assertion

that § 1503 contains such a scienter requirement. The *Pettibone* Court, in interpreting a predecessor statute to § 1503, stated that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." *Id.* at 206. *Pettibone* reversed convictions under the obstruction statute then in effect because the indictment did not charge that the purpose of the conspiracy was to violate an injunction or interfere with proceedings in the circuit court. While the circuit court had enjoined members of a labor union from interfering with a mining company's management, the indictment failed to charge that union members were aware of the injunction.

We examined the *Pettibone* decision in *United States* v. *Jennings*, 471 F.2d 1310 (2 Cir.), *cert. denied*, 411 U.S. 935 (1973). In holding that 18 U.S.C. § 201(b)(1) (anti-bribery statute) does not require knowledge that the bribee was a federal official, we interpreted *Pettibone* as follows:

> "[A] closer reading makes clear that the court was concerned with the necessity for charging knowledge or notice of the existence of the injunction, *as distinguished from its federal character.*"

471 F.2d at 1313 (emphasis added). In the instant case, we hold that the government was required to prove only that appellants conspired to interfere with the administration of justice, not that they knew which sovereign, federal or state, was administering that justice in the Curcio trial.

We also find unpersuasive appellants' reliance on cases which have arisen in other courts under § 1503. In *United States* v. *Baker*, 494 F.2d 1262 (6 Cir. 1974), the defendant

was charged with violating § 1503 as the result of his having threatened a police officer who planned to testify in a federal proceeding. The Sixth Circuit, however, held that there was insufficient evidence to establish that the threat related to the officer's testimony in a federal proceeding. There the officer had arrested the defendant several times. The officer's testimony in the federal proceeding was not the only conduct to which the threat could have applied. *Id.* at 1265. As the court stated, "[t]he mere existence of that federal proceeding is not sufficient to establish or support any inference that the federal proceeding was the focus of the alleged threat." *Id.* In *Baker* the issue was whether the proceeding which the defendant intended to influence by threatening a witness was federal or not, not whether the defendant *knew* that it was federal.

In the instant case there is no doubt that the subject of appellants' discussions and the provision of vomit-inducing medication related to the pending criminal prosecution against the Curcios in the federal court. That appellants did not know (or that their conversations did not suggest that they knew) in which court the Curcios were being tried does not preclude their being convicted under § 1503.

Similarly, the issue in *United States* v. *Vesich*, 724 F.2d 451 (5 Cir. 1984), was whether proceedings in fact were pending and whether the defendant had knowledge of such proceedings, not whether the defendant *knew* such proceedings to be federal in nature. As the *Vesich* court stated, "[a] prerequisite to any violation of section 1503 is the existence of a pending judicial proceeding known to the violator." *Id.* at 454 (citing *Pettibone*, *supra*, 148 U.S. at 205-07; *Odom* v. *United States*, 116 F.2d 996, 998 (5

Cir.), *rev'd on other grounds*, 313 U.S. 544 (1941)). The specific concerns of the *Vesich* court were whether grand jury proceedings in fact were pending, and whether there was sufficient evidence to establish that the defendant knew such proceedings were pending and that the witness he wished to influence was to testify before that body. While dicta in *Baker* and *Vesich* incidentally may merge the jurisdictional and scienter discussion because of the specific facts in those cases, they do not persuade us that, where a single judicial proceeding is known to be pending, the government must establish that appellants knew that justice was being administered in a federal court.

Our refusal to add to the statute a scienter requirement, in the absence of congressional intent to the contrary, is consistent with the Supreme Court's analyses of other statutes in *United States* v. *Feola*, 420 U.S. 671 (1975), and *United States* v. *Yermian*, 104 S. Ct. 2936 (1984). In a prosecution under the federal assault statute, 18 U.S.C. § 111, the *Feola* Court held that the statute does not require proof that the defendant knew the victim was a federal officer. "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." 420 U.S. at 685. *Feola* also made clear that the conspiracy statute, 18 U.S.C. § 371, does not require a showing that the defendant knew his conduct violated federal law. *Id.* at 687. And in *Yermian*, in holding that the federal false statements statute, 18 U.S.C. § 1001, does not include a scienter requirement with respect to the federal nexus, the Court concluded that " 'the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the

federal statute.' " 104 S. Ct. at 2940 (quoting *Feola*, 420 U.S. at 676-77 n.9). Indeed, the case for not requiring knowledge of the federal nexus is easier here than in *Feola* or *Yermian*, since the omnibus clause of § 1503, under which appellants were convicted, does not even mention federal jurisdiction.

We therefore hold that, while "the existence of an ongoing proceeding is an element of a § 1503 violation", *United States* v. *Reed*, 773 F.2d 477, 485 (2 Cir. 1985), as is an intent to impede the administration of justice, *United States* v. *Buffalano*, 727 F.2d 50, 54 (2 Cir. 1984) (citing *United States* v. *Moon*, 718 F.2d 1210 (2 Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984)), the statute does not require a specific intent to interfere with a proceeding known by the defendant to be federal in nature. *United States* v. *Jennings*, *supra*.

III.

Appellants' other claims of error are without merit and only three require brief mention.

Both appellants assert that the "endeavor" which they were charged with conspiring to commit terminated when Gus Curcio sustained an apparent seizure in court on October 27, 1983; and that the subsequent conversation of December 7, 1983, and the provision of the emetic, therefore, were not encompassed under the conspiracy charge. In support of this claim, appellants rely on the language in *United States* v. *Minkoff*, 137 F.2d 402, 404 (2 Cir. 1943), that "[t]he offense was complete, regardless of success, when the first overt act to carry it out was committed." This misconstrues the law of conspiracy. The reference to "complete" refers to the point at which a

viable conspiracy charge existed; it does not mean that acts subsequent to the first overt act cannot be prosecuted. *United States* v. *Perlstein*, 126 F.2d 789, 798 (3 Cir.), *cert. denied*, 316 U.S. 678 (1942). The conspiracy count here properly encompassed activities which occurred during the presentation of evidence at the Curcios' trial, which ended on December 8, 1983.

Prior to the trial of the instant case, appellants moved to suppress the evidence obtained by electronic surveillance on the grounds that the warrant issued for the surveillance did not list obstruction of justice as a possible violation and the government did not comply with the sealing requirements of 18 U.S.C. § 2518(8)(a) (1982). On December 9, the government reported the contents of the December 7 conversation, explicitly detailing the evidence relating ot the § 1503 violation, to Robert W. Sweet, *District Judge*, who authorized an extension of the time period for electronic surveillance. In *United States* v. *Masciarelli*, 558 F.2d 1064, 1067-68 (2 Cir. 1977), we held that authorization under 18 U.S.C. § 2517(5) may be inferred when a judicial officer grants a continuation of the surveillance, even though the offense was not listed in the original order, so long as he was made aware of "material facts constituting or clearly relating to [the] other offenses" in the application for the continuance. *See United States* v. *Tortorello*, 480 F.2d 764, 781-83 (2 Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States* v. *Marion*, 535 F.2d 697, 703-04 (2 Cir. 1976). These requirements were amply satisfied here. Furthermore, the fact that the government did not present the recordings for sealing until January 5, 1984, five days after the first surveillance period expired, did not violate 18 U.S.C. § 2518(8)(a) which requires that such recordings be made

available to the judge "[i]mmediately upon the expiration of the period of the order". The intervening two-day holiday, the unavailability of the judge who issued the surveillance order for a third day, the need for the agent to prepare the paperwork for the extension of the surveillance, and the absence of prejudice, all combine to excuse the relatively short period of delay here in question. *See United States* v. *McGrath*, 622 F.2d 36, 42-43 (2 Cir. 1980) (eight day delay excused).

Appellants also assert that the court erred in admitting the expert testimony of an FBI agent who described such terms as "captain", "capo", "regime" and "crew". That testimony aided the jury in its understanding of the recorded conversations, and helped establish the relationship between appellants and the Curcios as well as appellants' interest in disrupting the Curcio trial. Moreover, Judge Daly specifically cautioned the jury as to the limited purpose of the agent's testimony and that the indictment did not charge conduct relating to organized crime activities. We hold that there was no abuse of discretion in the court's determination that the probative value of the agent's testimony outweighed any potential prejudice. *See United States* v. *Riccobene*, 709 F.2d 214, 230-31 (3 Cir.), *cert. denied*, 464 U.S. 849 (1983) (explanation of organized crime terms allowed).

We have considered carefully all of appellants' claims of error and we hold that all are without merit.

IV.

To summarize: Under 18 U.S.C. § 1503 the government need not establish that the proceedings which appellants intended to disrupt were known by appellants to be

federal in nature. We decline to add to the statute a scienter requirement that a person know which sovereign, federal or state, is administering the justice which he is charged with having impeded. We hold that appellants' other claims of error are without merit.

Affirmed.

**APPENDIX B—ORDER OF JUSTICE THURGOOD MARSHALL, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, AND CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT.**

SUPREME COURT OF THE UNITED STATES
No. A-681

JOHN GREGORY ARDITO,

Applicant,

v.

UNITED STATES

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 1, 1986.

s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 10th
day of March, 1986.

**APPENDIX C—INDICTMENT CHARGING PETITIONER WITH A VIOLATION OF 18 USC 371 AND 1503, FIRST COUNT.**

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUTH
GRAND JURY N-84-2

UNITED STATES OF AMERICA

v.

JOHN GREGORY ARDITO, a/k/a "Buster"; VINCENT J. POLLINA; FRANCIS CURCIO; GUS CURCIO.

---

Criminal No. N-8447 TFGD
Violation: 18 USC §371 (Conspiracy); 18 USC §1503 (Obstruction of Justice); 18 USC §2 (Aiding and Abetting)

*INDICTMENT*

The Grand Jury charges that:

*COUNT ONE*

1. At all times pertinent hereto, FRANCIS CURCIO and GUS CURCIO, having been charged with making extortionate extensions of credit and conspiring to make extortionate extensions of credit in violation of Section 892 of Title 18, United States Code, were defendants in the case of *United States v. Francis Curcio and Gus Curcio,* an ongoing jury trial in the United States District Court for the District of Connecticut.

2. Beginning on or about October 21, 1983 and continuing thereafter until on or about December 8, 1983, in

the District of Connecticut and elsewhere, JOHN GREGORY ARDITO, a/k/a "Buster", VINCENT J. POLLINA, FRANCIS CURCIO and GUS CURCIO, defendants herein, did unlawfully, willfully and knowingly combine, conspire and agree together and with other persons to commit an offense against the United States, that is, to corruptly endeavor to influence, obstruct and impede the due administration of justice, in violation of Section 1503 of Title 18, United States Code.

3. It was part of said conspiracy that defendants GUS CURCIO and FRANCIS CURCIO would and did fabricate illnesses and create disturbances during the course of the trial in *United States v. Francis Curcio and Gus Curcio,* in order to influence, obstruct and impede said trial.

4. It was further part of said conspiracy that defendants JOHN GREGORY ARDITO, a/k/a "Buster" and VINCENT J. POLLINA would and did obtain drugs and medication in order to assist defendants FRANCIS CURCIO and GUS CURCIO in influencing, obstructing and impeding said trial.

*OVERT ACTS*

In furtherance of the conspiracy, and in order to effect the objects thereof, the following overt acts among others were committed by the defendants in the District of Connecticut and elsewhere.

1. On or about October 27, 1983, GUS CURCIO did fabricate a medical emergency before the jury during the trial of *United States v. Francis Curcio and Gus Curcio.*

2. On or about October 27, 1983, FRANCIS CURCIO did verbally attack one of the prosecutors conducting the trial of *United States v. Francis Curcio and Gus Curcio* in order to cause a mistrial.

3. On or about December 7, 1983, JOHN GREGORY ARDITO, a/k/a "Buster" and VINCENT J. POLLINA did engage in a conversation at 1289 Edison Avenue, Bronx, New York, relating to obtaining drugs and medication in order to obstruct and impede the trial of *United States v. Francis Curcio and Gus Curcio.*

All in violation of Section 371 of Title 18, United States Code.

*COUNT TWO*

On or about October 27, 1983, in the District of Connecticut, FRANCIS CURCIO and GUS CURCIO, defendants herein, did willfully, knowingly and corruptly endeavor to influence, obstruct and impede the due administration of justice by creating disturbances in the courtroom during the trial of *United States v. Francis Curcio and Gus Curcio* in the United States District Court for the District of Connecticut, with the intent to influence, obstruct and impede said trial.

In violation of Sections 1503 and 2 of Title 18, United States Code.

A TRUE BILL

s/ Arthur J. Shaw III
FOREMAN

s/ Alan H. Nevas
ALAN H. NEVAS
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

s/ William A. Keefer
WILLIAM A. KEEFER
ATTORNEY
U.S. DEPARTMENT
OF JUSTICE

s/ John H. Durham
JOHN H. DURHAM
ATTORNEY
U.S. DEPARTMENT
OF JUSTICE

## APPENDIX D—CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION: UNREASONABLE SEARCHES AND SEIZURES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches or seizures of themselves shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

### FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Any person accused of a capital or infamous crime, . . . must be indicted by a Grand Jury . . ."

"No person may lose his life, liberty, or property, except by due process of law . . ."

### 18 USC 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

"If two or more persons conspire either to commit any offense against the United States . . . , and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than the five years, or both."

### 18 USC 1503 INFLUENCING OR INJURING OFFICER OR JUROR GENERALLY

"Whoever corruptly, . . . , or corruptly or by threats or force, or by threatening letter or communication, influences, obstructs, or impeads or endeavors to influence,

obstruct, or impead, the due administration of justice shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

18 USC 2518(8)(a) provides in part as follows:

"The contents of any wire or oral communication intercepted by any means authorized . . . shall, if possible, be recorded on tape or wire or other comparable device. . . . Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the Judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the Judge orders . . ."

18 USC 2517(5)

"When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts a wire or oral communication relating to offences other than those specified in the order . . . , the contents thereof, and the evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a Judge of competent jurisdiction where such Judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable."

Supreme Court, U.S.
FILED
APR 3 1986
JOSEPH F. SPANIOL, JR
CLERK

No. 85-1287

# In the Supreme Court of the United States

OCTOBER TERM, 1985

BOARD OF REGENTS OF
THE UNIVERSITY OF OKLAHOMA, PETITIONER

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

JOHNNY J. BUTLER
*General Counsel (Acting)*
*Equal Employment Opportunity Commission*
*Washington, D.C. 20507*

## QUESTION PRESENTED

Whether the court of appeals erred in reversing the entry of judgment notwithstanding the verdict on the ground that there was sufficient evidence to support the jury's finding of age discrimination.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 3 |
| Conclusion | 9 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Carter* v. *Duncan-Huggins, Ltd.*, 727 F.2d 1225 | 5 |
| *Coburn* v. *Pan American World Airways, Inc.*, 711 F.2d 339, cert. denied, 464 U.S. 994 | 4 |
| *Douglas* v. *Anderson*, 656 F.2d 528 | 4, 5 |
| *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 | 5, 6 |
| *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285 | 4 |
| *Houser* v. *Sears, Roebuck & Co.*, 627 F.2d 756 | 4 |
| *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F.2d 998 | 4 |
| *Metrocare* v. *Washington Metropolitan Area Transit Authority*, 679 F.2d 922 | 5, 8 |
| *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 | 5, 6, 8 |


Statute:


| | |
|---|---|
| Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* | 2 |

# In the Supreme Court of the United States

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 774 F.2d 999. The opinion of the district court (Pet. App. 1b-10b) is reported at 554 F. Supp. 735.

### JURISDICTION

The judgment of the court of appeals (Pet. App. D) was entered on October 1, 1985. A petition for rehearing was denied on October 31, 1985 (Pet. App. E). The petition for a writ of certiorari was filed on January 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In November 1978, the position of chief of the cartography section of the Oklahoma Geological Survey

(OGS) became vacant. Marion Clark, then 59 years old and a long time employee of OGS, was qualified for the position and applied for it. Instead of promoting Clark, petitioner conducted a nationwide search to fill the position and ultimately selected 36-year-old Wayne Furr. The Equal Employment Opportunity Commission brought this action in the United States District Court for the District of Oklahoma alleging, inter alia, that the University's failure to promote Clark was due to her age and therefore violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*[1]

Prior to trial the parties stipulated to a prima facie case (Pet. App. 3a). Therefore, the evidence at trial focused primarily on whether or not petitioner had a valid, nonpretextual reason for failing to promote Clark. The evidence showed that a 19-member search committee was established, chaired by Dr. Charles Mankin, the director of OGS. The committee narrowed the selection to three candidates, including Clark, but ultimately voted to hire Furr. Dr. Mankin was the chief witness for petitioner. He testified that Clark was passed over, not because of her age, but because of her lack of management experience and because of productivity problems in the section (*id.* at 4b). The testimony of other witnesses and other portions of Mankin's own testimony cast considerable doubt upon this explanation. See Pet. App. 6a-8a; point 2, *infra.*

2. After the jury returned its verdict in favor of the Commission, the district court entered judgment for petitioner notwithstanding the verdict (n.o.v.) (Pet. App. 1b-10b). The court found that petitioner's proffered reasons for Clark's nonselection—her "lack of management experience, and her productivity problem" (Pet.

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[1] The Commission also alleged that the University violated the ADEA by retaliating against Clark for filing her charge with the Commission. The jury agreed, and that issue was not raised on appeal.

App. 8b)—"were unrefuted" (*id.* at 9b). In support of that conclusion, the court credited Mankin's testimony that there were productivity problems in the cartographic section that could be resolved only through the injection of "new blood" (*id.* at 4b), and it found that petitioner had proven that Clark herself had a productivity problem (*id.* at 8b). The court also relied upon various selection committee members' testimony that Clark's age was not a factor in their deliberations and that personality conflicts between Mankin and Clark and Clark's relative lack of managerial skills accounted for their decision (*id.* at 5b-6b).

3. The court of appeals reversed (Pet. App. 1a-11a), holding that the evidence was sufficient to support the jury's verdict and that, in ruling otherwise, the district court improperly had "reweighed the evidence and factored in its view of the credibility of the witnesses" (Pet. App. 4a). The court noted that Mankin's testimony regarding the section's productivity problem was both internally inconsistent and inconsistent with other testimony (*id.* at 6a); that there was conflicting evidence concerning Clark's and Furr's relative supervisory qualifications (*id.* at 7a); that, despite alleged productivity concerns, Furr was permitted substantial absences from the section soon after his arrival, which yielded a rise in the number of projects contracted out (*ibid.*); and that there was evidence that Mankin engineered the recruitment and hiring process to thwart Clark's promotion (*id.* at 7a-8a).

## ARGUMENT

Petitioner contends (Pet. 7-23) that the court of appeals erred in finding that the evidence was sufficient to support the jury's verdict. This contention is entirely factbound, and it is without merit.

1. At the outset, we note that petitioner's assertion (Pet. 12-18) that the court of appeals' opinion conflicts with decisions in other circuits is wholly without foundation. The legal standard for review of judgment notwithstanding the verdict utilized by the court below (see Pet. App. 4a) accords with the standard used in other decisions—namely, judgment n.o.v. is appropriate only when the evidence as a whole points but one way and is susceptible of no reasonable inferences that would support the jury's verdict. See, *e.g.*, *Coburn* v. *Pan American World Airways, Inc.*, 711 F.2d 339, 342 (D.C. Cir.), cert. denied, 464 U.S. 994 (1983); *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983); *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 295 (8th Cir. 1982); *Douglas* v. *Anderson*, 656 F.2d 528, 535 (9th Cir. 1981); *Houser* v. *Sears, Roebuck & Co.*, 627 F.2d 756, 757 (5th Cir. 1980). Whether a judgment n.o.v. has been correctly entered turns on the facts of each case, and the fact that reversal by the court of appeals was appropriate here and affirmance was appropriate in the cases cited by petitioner reflects no more than the application of settled legal principles to different fact patterns.

Petitioner mischaracterizes the court of appeals' decision in stating (Pet. 7) that it holds that "where a complainant has established a *prima facie* case in an age discrimination action, a directed verdict or judgment notwithstanding the verdict is not proper." To the contrary, the court did not focus on the existence of a prima facie case; it addressed the question whether the Commission had produced sufficient evidence to allow a reasonable jury to find that petitioner's explanation of its actions were pretextual and, therefore, that Clark's age was a determining factor[2] in her nonselection (see Pet. App. 5a-8a).[3]

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[2] The court of appeals inquired "whether the promotion would have been granted but for the plaintiff's age" (Pet. App. 5a).

[3] In the course of its argument, petitioner states that the "hiring [of] a younger person instead of an older one [cannot] raise an inference of

The court's analysis was wholly consistent with the principle put forth by petitioner that "once the employer has articulated a legitimate nondiscriminatory reason for the decision, the presumption created by the *prima facie* case is destroyed, *and without more*, there can be no inference of age discrimination" (Pet. 17-18) (emphasis supplied). The court of appeals was examining precisely the "something more" that the Commission supplied here, viz., testimonial and documentary evidence that petitioner's chief witness, called to explain his actions, was unworthy of belief and therefore that the articulated reason was not in fact the true reason for the employment decision. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981).[4]

By the same token, the court did not improperly place upon petitioner the burden of proving nondiscrimination (cf. Pet. 19-20). The court stated (Pet. App. 5a):

> With the stipulation [of a prima facie case], the burden of going forward shifted to the employer to rebut the presumption of discrimination by producing evidence that the employer's choice was motivated by a legitimate, non-discriminatory reason. If, by admissible evidence, the employer's explanation raises a genuine issue of fact * * * the burden of proof returns to the plaintiff.

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discrimination" (Pet. 13). As this Court has made clear, however, the unexplained selection of someone outside a protected class can raise an inference of discrimination. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). And where, as here, a plaintiff shows that the proffered explanation was pretextual, the fact finder may reasonably infer a discriminatory motive.

[4] It is clear that a proffered justification can be shown to be pretextual by means of discrediting the testimony that advances that justification. See, *e.g.*, *Carter* v. *Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1233-1235 (D.C. Cir. 1984); *Metrocare* v. *Washington Metropolitan Area Transit Authority*, 679 F.2d 922, 926-927 (D.C. Cir. 1982); *Douglas* v. *Anderson*, 656 F.2d at 535 n.7.

Thus, the court of appeals' approach was fully in accord with that set forth in *Burdine,* 450 U.S. at 252-256—the defendant has the burden of production of a legitimate reason for the employment decision in order to rebut the prima facie case and the plaintiff then has the burden of proving that the proffered reason is pretextual. The plaintiff may make this latter showing "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence" (*id.* at 256).[5]

2. The court of appeals correctly found that the jury verdict was supported by the evidence. The Commission sought to show that petitioner's proffered explanation for Clark's rejection was "unworthy of credence" (*Burdine,* 450 U.S. at 256). To the extent the jury disbelieved petitioner's explanation, its action remained "otherwise unexplained" and the jury could reasonably have inferred that Clark's nonselection was based "on the consideration of impermissible factors," viz., her age. *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577 (1978).

There was ample evidence here to support the Commission's theory that Mankin had discounted Clark for promotion because of her age, that he engineered the recruit-

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[5] There is no merit to petitioner's assertion (Pet. 19) that the court of appeals' opinion "allows the jury to substitute its business judgment for [that of] the employer's." Indeed, the jury below was specifically instructed "that the [d]efendant is entitled to make its own subjective business judgments concerning how its business is to be conducted, as long as its actions are motivated by factors other than age discrimination," and that "an employer is not legally obligated to give preferential treatment to persons in the protected age class when making hiring decisions" (VI Tr. 235). The court of appeals simply allowed the jury to find that petitioner's claim (Pet. 21) that the "members of the nineteen-member search committee determined that Mr. Furr's qualifications for the job were superior to Ms. Clark's" was not supported by the record as a whole.

ment and selection process to achieve this predetermined end, and that his purported concern about the section's productivity and Clark's alleged inability to remedy the problem were pretextual. There was evidence that he conducted an unusual national search in contrast to the University's normal policy of encouraging promotions from within (IV Tr. 104; PX 3) and that he criticized her qualifications before the selection committee (II Tr. 60-63; VI Tr. 140-141, 180-181).[6] Indeed, in order to hire Furr, a man 23 years Clark's junior, Mankin had to persuade the employer to increase the salary for the position on two separate occasions by a total of about 40 percent.[7] Mankin's claim that this effort was due to the need to improve the section's productivity was severely undermined on cross-examination by his internally inconsistent testimony regarding productivity, which in part was refuted by documentary evidence.[8] Mankin's alleged con-

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[6] In the words of one member, Mankin's effort "was a pretty obvious attempt to influence the [committee] vote," and Mankin's comments were "fairly devastating" to Clark's application (VI Tr. 169, 181). Mankin denied that he was critical of Clark's qualifications and that he made other statements attributed to him by other witnesses (IV Tr. 30-32).

[7] At the beginning of the national search, Mankin persuaded the University's personnel office to increase the position's salary range from $13,000-$14,000 to $17,000 (PXs 1, 69; IV Tr. 79; VI Tr. 59; PX 69). Mankin testified that after the vote he discovered that Furr required at least $19,000 annually (IV Tr. 25). Pursuant to Mankin's second request to the University's personnel office (III Tr. 46; PX 25), the salary range was increased to $14,560-$19,885 (PX 70).

[8] Mankin variously testified that he had been concerned about productivity in the section since 1971 (IV Tr. 3), or since 1974 (III Tr. 97); that as far as he knew productivity could have been fine (III Tr. 68); that he had no way of knowing whether there was any productivity problem (II Tr. 90; III Tr. 68, 94); that there was no documentation of his concern (III Tr. 98); that there was written documentation of his concern dating back to 1974 (III Tr. 97) that is not reflected in the record; and that he never commended the section for the quantity of

cern for the section's productivity was further belied by the release of Furr to attend university classes after his hire and by the unprecedented amount of work contracted out after that time (see I Tr. 181; IV Tr. 195; V Tr. 55). For these reasons, the jury justifiably could have completely discredited Mankin, who was petitioner's primary vehicle for the articulation of its "legitimate" reasons for not promoting Clark, and found that in the absence of another credible explanation, age did play a role in the selection process. See *Burdine,* 450 U.S. at 255 n.10; *Metrocare* v. *Washington Metropolitan Area Transit Authority,* 679 F.2d at 926-927.

With respect to Clark's alleged deficiencies in supervisory/managerial skills, the jury reasonably could have concluded that this explanation was also pretextual. Mankin testified that he was unaware that Clark often performed as acting chief of the section (Supp. Tr. 69), but that testimony was refuted by another witness (VI Tr. 140-142). Moreover, one of Furr's letters of recommendation noted his "lack of exposure to supervision" (DX 61). Prior to 1979, Clark was given excellent performance evaluations by Mankin and the largest aggregate salary increase in the section (I Tr. 91; IV Tr. 42-43). Based upon the objective evidence, the jury reasonably could have concluded that Furr was no better qualified than Clark in this regard.[9] In sum, it was only by reweighing the evidence and the credibility of witnesses that the district

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its production (IV Tr. 21), though the minutes of a January 1977 staff meeting reflected that he had (PX 66, at 3; IV Tr. 42). Mankin also testified that any productivity problem in the section was the fault of Roy Davis (III Tr. 100), whose November 1978 resignation as section chief created the vacancy at issue, not Clark.

[9] Petitioner errs in criticizing (Pet. 7-11) the court of appeals' factual observations as contrary to the record or irrelevant to the issue of discrimination. Petitioner does have a policy favoring promotion

court could have entered judgment n.o.v. Accordingly, the court of appeals correctly reversed this usurpation of the jury's role.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1986

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from within (see IV Tr. 104; PX 49, at 3). The additional procedural irregularities noted by the court and further explained by petitioner (Pet. 9-10) simply supplement the evidence that Mankin manipulated the selection process, as the Commission alleged. In criticizing the court for understating Furr's supervisory qualifications (Pet. 11), petitioner merely reviews the evidence in the light most favorable to its position, which is precisely the opposite of the review required on its motion for judgment n.o.v. Petitioner misses the import of the court's observations concerning Furr's classroom absences after his hire (Pet. 10-11), which suggest that Mankin's concern for productivity was pretextual.